DISTRIBUTED JAN - 5 2003 PAGE 39

ORIGINAL

FILED
DEC 31 2002
CLERK

NO. 02-6320

IN THE SUPREME COURT OF THE UNITED STATES

JOHN J. FELLER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JOHN J. FELLERS
PRO SE
REG. NO. 16253-047
FEDERAL CORRECTIONAL
INSTITUTION- PEKIN
P.O. BOX 5000
PEKIN, IL 61555-5000

OFFICE OF THE CLERK

6 pp

QUESTIONS PRESENTED

I. Did the Court of Appeals err when they concluded that Petitioner's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), was not violated because Petitioner was not "interrogated" by Government agents; when the proper standard under Supreme Court precedent, is whether the Government agents "deliberately elicited" information from Petitioner?

II. Should the second statements- preceded by Miranda warnings- have been suppressed as fruits of the illegal post-indictment interview without the presence of counsel, under this Court's decisions in Nix v. Williams, 467 U.S. 431 (1984), and Brown v. Illinois, 422 U.S. 590 (1975)?

IN THE SUPREME COURT OF THE UNITED STATES

NO. 02-6320

JOHN J. FELLERS, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

REPLY BRIEF FOR PETITIONER

GOVERNMENT'S BRIEF IN OPPOSITION

The Solicitor General, on behalf of the United States of America, filed a Brief in Opposition with this Court on December 9, 2002. Petitioner received the Brief on or around December 16, 2002.

The Government's contention is that the Eighth Circuit Court of Appeal's opinion does not conflict with any decisions of this Court. Government's Brief, page 8 (hereinafter Gov. Br.). In arguing this contention, the Government claims that this Court has not set forth two distinct standards between

interrogation and deliberately elicit. However, the Government's contentions are misplaced.

This Court has set two different standards between Fifth and Sixth Amendment cases. For a violation of the Fifth Amendment it is whether the government interrogated a defendant. But for Sixth Amendment post-indictment interviews the Court has routinely applied the deliberate elicit standard. See, Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986)("[A]fter the initiation of adversarial judicial proceedings, the Sixth Amendment provides a right to counsel at a critical stage even when there is no interrogation and no Fifth Amendment applicability."). This Court has repeatedly stressed that affirmative interrogation, as in Rhode Island v. Innis, 446 U.S. 291 (1980), is not applicable to Sixth Amendment claims. See, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Innis, 446 U.S. at 300 n.4. In fact, under the Innis-interrogation standard, the defendant in Henry, Brewer, and Maine v. Moulton, 474 U.S. at 159 (1985), would not have had constitutional violations because they were not interrogated.

The Government also argues that the Eighth Circuit used the proper test to determine petitioner's Sixth Amendment claim. Gov.Br. page 16. The Eighth Circuit denied petitioner's Sixth Amendment claim and stated that they denied the claim because petitioner was not interrogated. The Government claims that the Eighth Circuit meant deliberately elicited and used that

standard to determine the Sixth Amendment claim. For the following reasons, the Government's contentions are incorrect.

First of all, just like when Congress drafts statutes, this Court must assume that the appeals court meant what it said. The appeals court used the word interrogation and it is preposterous to think that the court stated "interrogation" but then used the deliberately elicited test. Indeed, this was the reason for Judge Riley's concurrence. Judge Riley and the majority were in agreement that the fruits doctrine was inapplicable to the instant case. It can be presumed that Judge Riley authored his concurrence because the majority applied the wrong standard to the Sixth Amendment claim. Judge Riley stated that in determining Sixth Amendment claims the proper test is whether the government deliberately elicited information from petitioner. And Judge Riley did not use the word interrogation.

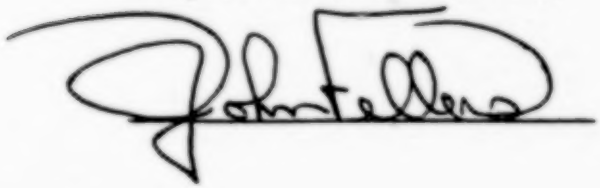
Also, it is clear that under the deliberately elicited test, there was a Sixth Amendment violation. The Eighth Circuit meant what it said. It is questionable whether there was a claim under the interrogation standard but under the proper standard there was a Sixth Amendment violation. As such, the opinion of the appeals court conflicts with many decisions of this Court and this Court should grant this writ of certioarari.

CONCLUSION

Therefore, this Court should grant this petition for a writ of certiorari.

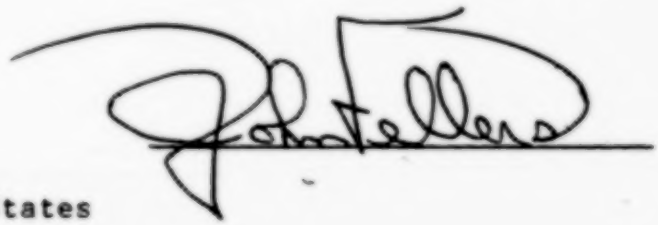
Date: 12-30-02

Respectfully submitted,



CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Reply Brief for Petitioner was sent to the parties below. Said brief was placed in the U.S. Mail, postage pre-paid, on this 30 day of December, 2002.



Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-0001

Janice Lipovsky
U.S. Attorney
487 Federal Building
100 Centennial Mall North
Lincoln, NE 68508